

1611439 (Migration) [2018] AATA 3806 (23 July 2018)

CORRIGENDUM

DIVISION: Migration & Refugee Division

CASE NUMBER: 1611439

MEMBER: Ian Garnham

DATE OF DECISION: 23 July 2018

**DATE CORRIGENDUM
SIGNED:** **25 September 2018**

PLACE OF DECISION: Melbourne

AMENDMENT: The following corrections are made to the
decision:

1. In paragraph 37, December 2018 has been changed to December 2008.
- 2.
- 3.
- 4.
- 5.
- 6.

Ian Garnham
Member

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1611439

MEMBER: Ian Garnham

DATE: 23 July 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 23 July 2018 at 4:56pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Schedule 3 criteria – Compelling reasons – Pursued protection claims – Residency and common travel information – Relationship on free will – Honour killings – Risk of serious harm by family – Sponsor’s financial capacity – Applicant’s qualifications – Sponsor’s duration in Australia – Ability to rearrange affairs – Decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 65, 359AA, 376

Migration Regulations 1994 (Cth), Schedule 2, cl 820.211, Schedule 3 Criterion 3001

CASES

Babicci v MIMIA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration made on 12 July 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 15 April 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d) because the visa applicant did not meet the Schedule 3 criteria and there was no information that there were compelling reasons to waive the Schedule 3 criteria.
4. The applicant appeared before the Tribunal on 28 June 2018 to give evidence and present arguments. The Tribunal also received oral evidence from [the] applicant's partner and sponsor.
5. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages
6. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing. A 1st submission¹ was received on 25 June 2018 and a 2nd submission² was received on 4 July 2018.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the visa applicant meets the Schedule 3 criteria, and if not, whether there are compelling reasons to waive the requirements of the criteria.

7. SCHEDULE 3 CRITERIA (cl.820.211(2)(d))

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

9. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).

¹At FF: 121-126 (AAT)

²At FF: 131-133 (AAT)

10. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

11. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
12. In this case the relevant day is the last day the visa applicant held an effective substantive visa. After arriving in Australia on 03/03/2010 the visa applicant applied for a protection visa on 12/07/2010 and a bridging visa was provided to him in association with that application. Since that time the visa applicant has only held bridging visas.
13. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

14. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria (3001), it is required to consider whether there are compelling reasons for not applying the criteria.
15. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babici v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.

8. *Policy considerations:*

16. The relevant Departmental policy guidelines are contained in the Procedures Advice Manual (PAM3).
17. The policy stresses that; ...the provisions are not intended to give, or be perceived to give an unfair advantage to persons who:
- *Fail to comply with their visa conditions or*
 - *Deliberately manipulate their circumstances to give rise to compelling reasons or*
 - *Can leave Australia for a partner visa outside Australia.*
18. In this case it is appropriate to consider the migration background and actions of the review applicant because, on its face, the evidence suggests that he has failed to

comply with his previous visa conditions and manipulated his circumstances to seek to give rise to compelling reasons.

9.

10. Relevant background:

19. The visa applicant first came to Australia from Jordan in December 2007 on a subclass [student] visa and departed lawfully 12 months later. He again came to Australia on 03/03/2010 on a subclass [student] visa and has not departed.
20. On 12/07/2010 the visa applicant lodged his first of 2 protection visa claims, both of which were refused by the Department and these decisions were affirmed by the forerunner of this tribunal (the Refugee Review Tribunal (RRT)) and a differently constituted AAT tribunal.³ During this intervening period (12/07/2010 – present) the visa applicant also requested Ministerial intervention in his case and a successful judicial review application was made in respect of the 2nd protection visa claim.
21. I note that this intervening period contains a period (25/11/2011 – 31/08/2012) when the visa applicant was unlawfully without a visa. I also note that the delegate found that the visa applicant's *...immigration history shows a willingness to lodge unmeritorious visa applications to extend [his] stay in Australia until circumstances exist which would allow [him] to lodge a further application onshore.*
22. The delegate also noted that the visa applicant declined interviews with the delegate in respect to his 2nd protection visa application and that at the hearing of both his protection visa hearings before the RRT and AAT the visa applicant declined the opportunity to attend his hearings. When I asked the visa applicant why he did not attend his hearing at the RRT he said; at that time he was represented by [a legal centre] and they did not tell him that his RRT hearing was being conducted and also did not tell him that he became unlawful after the first RRT decision to affirm the delegate's decision to reject his protection visa application. He also said that he only learned 2-3 weeks ago that he was unlawful for the above period when his current representative advised him of this fact. He claims he thought he had a valid bridging visa for all of the time he has been in Australia since his last substantive visa ceased to have effect.
23. I have also noted that the same claim was made in the first submission:

11. [The applicant] advises that prior to the expiration of his [Student] visa, being 30 August 2012, he approached the [legal centre] to assist him with his application for a XA-PV Protection visa. After his application was submitted he approached a Migration Agent to take over and represent him and having relied on his representative, unfortunately [the applicant] was never advised that his visa was or had expired – he instructs that he honestly and reasonably believed everything was fine in terms of his visa status.
24. In the 1st RRT reasons (1105647) it is stated that the tribunal received numerous requests to reschedule the hearing from the visa applicant's *adviser*. Finally the tribunal received a submission from the visa applicant's adviser stating that the visa applicant had instructed that a request be made that a decision be made by the tribunal based on the papers before it.⁴

³1105647 (RRT) & 1416715(AAT).

⁴At paragraph 20

25. It is also clear that for the review of the 2nd protection claim (AAT reasons (1416715)), that the visa applicant voluntarily elected not to attend the hearing of the matter:

12. *The applicant's representative advised in writing that he had been instructed to request that a decision be made on the papers before the Tribunal.*⁵

26. At this hearing the visa applicant said that his representative contacted him before the 2nd protection visa application hearing and told him not to attend the tribunal hearing.

27. I consider it is unlikely that the visa applicant has been truthful in their evidence with respect to their failure to attend the previous protection visa hearings. In both sets of tribunal reasons it is clearly stated that the representatives received instructions from the visa applicant that he would not attend the hearings and requesting that the review be conducted based on the material before the tribunal. The visa applicant is claiming that his representative for the first hearing did not tell him that the hearing was being conducted and the representative for the 2nd hearing *told* him not to attend the hearing. Given the importance of these hearings to the visa applicant's migration status I consider it highly unlikely that any representative would have adopted these approaches to a client's application for review.

28. I also consider it highly unlikely that the visa applicant would have been unaware of his unlawful status following the decision of the RRT until 2-3 weeks ago as he stated at the hearing. When the visa applicant applied to the Department (DIBP) for his bridging visa granted on 31/08/2012 he would have been made aware of his unlawful status at that time if he had not already been so advised.

29. While these issues have little bearing on the visa applicant's current putative compelling reasons to waive the Schedule 3 criteria, they do add weight to the delegate's view that the visa applicant has deliberately manipulated his circumstances by pursuing unmeritorious protection claims to avoid leaving the country. In addition, the visa applicant's dubious evidence on these points diminishes the overall credibility of all of his evidence.

30. With respect to the relationship the parties claim they met in July 2015. They have provided evidence that they married in April 2016⁶ and have shared rental accommodation (lived together) since 20/07/2016.⁷

31. On 22/03/2016 DIBP received anonymous *dob-in* information that, among other things, the visa applicant had manipulated his sponsor into a de facto relationship with him to obtain a permanent visa to remain in Australia.⁸ DIBP made this information subject to a section 376 certificate to protect the identity of the supplier of the information.

32. At the hearing I advised the visa applicant of the relevant content of the dob-in information and provided him with a range of alternative methods to respond to the information consistent with s.359AA of the Act.

33. Following consultation with his registered migration agent, the visa applicant elected to respond to the information directly at the hearing. In response, the visa applicant said that he and the sponsor were unaware of who would have made these allegations against him. The visa applicant also said that any claims of violence in

⁵At paragraph 3

⁶At F: 83 (AAT)

⁷At FF: 116-120 (AAT)

⁸At F: 94 (DIBP)

previous relationships have been dismissed and no claims of aggressive behaviour in this relationship existed. The current relationship is now of 3 years duration and the evidence that has been provided supports that it is a genuine relationship.

34. I am satisfied based on the documentary relationship evidence that has been provided to the tribunal; in particular the photographic, residency and common travel information of the parties, that the parties have been in a continuing relationship since marriage as they have claimed. I am also satisfied, based on the oral evidence of the sponsor at the hearing; that she has not been coerced into this relationship and has participated in the relationship of her own free will. I therefore attach no weight to the provision of the dob-in information in this case.
35. However an acceptance that the parties are in a genuine and continuing relationship does not mean that the visa applicant has not manipulated his circumstances in an attempt to create compelling reasons as to why the Schedule 3 criteria should be waived. It is the remaining role of the tribunal to assess the visa applicant's putative compelling reasons against the above background.

13. Putative compelling reasons:

36. At the hearing the visa applicant agreed that claimed compelling reasons of why the Schedule 3 criteria should be waived may be summarised as follows:

- The visa applicant's safety and life will be in grave danger due to a likelihood he will be attacked by one of his brothers if he is required to return to Jordan
- The sponsor could not accompany the visa applicant to Jordan because if he was at risk, so to would she

37. The visa applicant claims that when he was living in Jordan he had a relationship with a girl who he met in December 2018. He claims he went on and had sexual relations with this girlfriend and they were discovered. He said that his family are strict Sunni Muslims having sexual relations before marriage is a huge transgression of the religion.
38. At the hearing he specifically claimed that after his older brother found out about the transgression, he came to the visa applicant's house and threatened him and fired gun shots into the air while in the street outside the house. I have noted that this is the same claim that was argued at the visa applicant's first protection visa review considered and decided by the RRT. However, I have noted the visa applicant did not include evidence of direct harm by his oldest brother at that hearing. The way that evidence is presented in the RRT's reasons is that the visa applicant and his ex-girlfriend were both at risk of harm by honour killings by their fathers.
39. At the hearing of this matter the visa applicant said that he regularly speaks to his father (every 1-2 weeks) and he has consistently and recently advised him not to return to Jordan as his brother still intends to harm him if he returns. The visa applicant also said that his former girlfriend is now married (to a different person) and that his older brother is also married and has two children now aged approximately [age] and [age] years old.
40. When I suggested to the visa applicant; that almost 10 years must have passed since his older brother allegedly fired the gun and threatened him, and his brother's need to remain with and provide for his young family would prevent him from committing harm

to the visa applicant, for which he would be criminally responsible; he said this is not the case and the cultural need to restore the family's honour is very strong.

41. Even if I was satisfied the visa applicant has been truthful about these events, which I am not, I do not consider he would be at risk of serious harm by his oldest brother if he were to return to Jordan. This is because almost 10 years have passed since the alleged conduct occurred, the visa applicant's ex-girlfriend is now married and the visa applicant's older brother, who is also [an occupation], would not risk depriving his young family by harming his brother. It follows that I am not satisfied that this is a compelling reason to waive the Schedule 3 criteria.
42. At the hearing and in the submissions the parties have said that if the visa applicant is required to go offshore and goes to Jordan for a period the sponsor would not be able to go with him. This is because the sponsor will also be in danger if the visa applicant is in danger and it was stated in the 1st submission that the sponsor could not live and survive without the visa applicant. However she does not have any language skills and would be unable to work in Jordan. In both submissions and the hearing it was stated that if the visa applicant travels to Jordan alone and is offshore for a period the sponsor will be unable to survive financially and emotionally.
43. The parties have been renting together for over two years and the sponsor said that she has been paid for some [work] but primarily receives social security income. The visa applicant said that he receives income from Jordan of [amount]/month. He also said that he received work rights from DIBP since February of this year but has not worked as he has to first study so he can get a good job. The parties currently pay half each of their approximately [amount] monthly rent and the visa applicant said that he survives on the remaining [amount]/month. In the submissions and at the hearing the sponsor said that if the visa applicant goes offshore she will not be able to pay the rent or find another tenant and financially survive. She also said she is not able to live with her mother [because] she is subject to domestic violence and she would be unable to resume living with her brother in a share [house] (which is where she lived before beginning to live with the visa applicant) because they have had a falling out.
44. I do not accept that any special circumstances exist for the parties whereby it would be unreasonable for them to rearrange their affairs for a period to enable the visa applicant to apply for the visa offshore. There is no evidence before me that so doing he would not continue to receive his income from Jordan which would allow him to live independently far away from his brother if he chose to do so. In addition, I have noted that he has stated that he is qualified as [an occupation] and he previously worked in this field in Jordan. Indeed, to the 1st RRT hearing he provided evidence that (after leaving Australia following his first visit on 09/12/2008) he was doing some [work] for his brother when he met his former girlfriend in mid-December 2008.
45. Similarly I am not satisfied that it is unreasonable for the sponsor, who is [a certain age], to rearrange her affairs for a period to enable the visa applicant to make an offshore application. The visa applicant conceded that she had lived in [the city] for a number of years before meeting the visa applicant in 2015 and beginning to live with him in 2016.
46. The information the parties have provided has not convinced me that they have compelling reasons which powerfully drive me to a view that the Schedule 3 criteria should be waived in this case.

47. Therefore the tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).
48. The tribunal is also satisfied that the circumstances of the visa applicant do not meet the requirements of the alternative sub-clauses 820.211 (5), (6), (7), (8), or (9).
49. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

50. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Ian Garnham
Member

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.